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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAUL G. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S SUPPLEMENTAL PETITION

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REASON FOR GRANTING THE WRIT

1. A violation of 18 U.S.C. 201(g) cannot be sufficiently proved in the absence of the public official requesting or receiving "additional compensation" to his or her official salary, for or because of an official act. (Petition for Writ of Certiorari, p. 13)

The above was Petitoner's first reason for the Court to grant the Writ, regarding the gratuity count.

Petitioner stressed the above argument to the Circuit in his appeal. There is no evidence in the December 23, 1986 Opinion to indicate that the argument, or the many cases from the other Circuits which supported the argument, were ever considered.

The Sixth Circuit, in the instant appeal, ruled that the government had sufficiently proven a violation of 18 U.S.C. 201(g) without having to prove that Petitioner requested or received a gratuity or additional compensation to his

official salary.

Instead, the Panel reacted as if Petitioner had made the same argument of Senator Williams, that the "things of value" were "valueless" and, therefore, could not stand as the thing of value. Such was never Petitioner's argument on appeal.

Petitioner's argument was that a valid purchase would, indeed, provide an official with something of value, but such could not consitute the "thing of value", intended by Congress under 18 U.S.C. 201(g) because there would exist no "gratuity" in the transfer or the "additional compensation" to the official's salary which other Circuit's deemed necessary to constitute a violation.

The Panel ruled that there is "no authority for the proposition that the

items received must be 'gratuities' as that term is commonly understood."

The Circuit ruled further that a violation may be proven even when the government fails to prove that the "thing" came to the official as a "gratuity".

The Circuit continued and ruled specifically that items or services which the official purchases, paying full and fair price, are still to be considered "things of value" under the gratuity statute. (Petiton for a Writ of Certiorari, Paul G. Gorman v. United States, No. 86-1625, App. A, p. A-9) official act.

United States v. Mario Biaggi and Meade Esposito, ____ F. Supp. ____ (Cr. 87-151 EDNY, September 22, 1987)

Since Petitioner filed his Petition for a Writ of Certiorari, Mario Biaggi, a Member of Congress from New York, and

Meade Esposito, were tried in federal district court in the Eastern District of New York for, among other things, violations of 18 U.S.C. 201(f) and (g). Esposito was charged with paying for spa vacations for Rep. Biaggi and a friend, for or because of official acts. Both were acquitted of the more serious bribery charges, arising from the same transactions and convicted of the lesser "gratuity" charges under 201(f) and (g).

Of significance to the Court's consideration of whether a Writ should be granted in the instant case is the express manner in which both the government and the district court, obviously located in a Circuit other than the Sixth, interpretted the elements of 18 U.S.C. 201(f) and (g) and the purpose of the statutes.

Because of the short time between the return of the convictions and the staff

shortages due to the Jewish Holidays of last week, Petitoner was unable to obtain certified copies of the government's requests for charges to the jury and Judge Weinstein's actual charge. Instead, copies were obtained from the Judge's office. Petitioner affirms that the documents appended to this Supplement to his Petition are true and accurate photostatic duplications of those charges.

Contrary to the interpretations of the elements of 18 U.S.C. 201(g) by the Sixth Circuit, the government's requested charge to the jury, regarding 18 U.S.C. 201(f) and (g) were as follows: (BA 661)

> Congress, in enacting the gratuity statute, sought to prohibit any government employee from receiving, in the course of his official duties, ANY ADDITIONAL TIP OR GRATUITY for or because of any official act already done or to be done in the future. THE AWARDING TO, OR RECEIPT OR ACCEPTANCE BY, A GOVERNMENT EMPLOYEE OF GIFTS OR GRATUITIES WAS DEEMED AN EVIL in itself since the employee may then

tend, subtly or otherwise, to give preferential treatment to those who give gifts. (Emphasis Added) (App. A, p. 1)

The purpose of the law that prohibits receiving gratuities is to prohibit the public official, in the course of his official duties, from receiving ADDITIONAL COMPENSATION, AS A TIP OR GRATUITY for or because of an official act. (Emphasis Added) (App. A, Infra, p. 3)

This charge is adapted from the gratuity charge given by Judge Pratt in the Harrision Williams, and John Murphy, cases. It includes language recommended by Judge Sand, Instructions of Authority. United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966); United States v. Strand, 574 F.2d 993, 995 & n.2 (9th Cir. 1978); United States v. Niederberger, 580 F.2d 63, 68-69 (3rd Cir.), cert. denied sub nom; Gent v. United States, 439 U.S. 980 (1978); United States v. Evans, 572 F.2d 455, 479-81 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Brewster, 506 F.2d 62, 72, n. 26 (D.C. Cir. 1974).
(App. A. Infra, p. 5)

The Sixth Circuit used United States v. Williams, Supra, as it's primary

authority to rule that the only evidentiary requirement of the government was to prove that the items received were perceived by the official to have value. A reading of that case quickly reveals that the Second Circuit did not limit the evidentiary requirements in the manner found by the Sixth Circuit.

However, it is noteworthy that the government, in its requested charges to the jury in the Biaggi gratuity prosecution, affirmed to the district court that the charge it was requesting was the same charge used by Judge Pratt in the prosecution of Senator Williams. That charge, quite obviously, requires the government to prove, as elements of the offense, that both Senator Williams and Representative Biaggi requested or received "gratuities" which provided them "addittional compensation", for or because

of official acts.

Nothing in the government's requested charge limits the government to prove only that the official "perceived" the thing to have "value", as the sole determinant of guilt.

The Sixth Circuit's Opinion of the Petitioner's appeal is conspicuously absent, even though the ruling of law in that Opinion substantially reduces the government's burden of proving the crime. Every other Circuit which has considered the issue, however, is prominently displayed.

Judge Weinstein's charge was as follows:

> This provision, unlike the bribery provision, does not require a corrupt intent to influence a government official or employee. It prohibits the offering or giving or promise of giving to a public official ADDITIONAL COMPENSATION OR OTHER THING OF VALUE for or because of an official act. THE PROVISION DOES REQUIRE CRIMINAL INTENT. (Emphasis added) (App. B, Infra. P.3)

Like the government, the Chief Judge of the Eastern District of New York, a prominent Second Circuit jurist, did not interpret United States v. Williams, supra, to reduce the government's burden of proving the offense to "perceived value", as did the Sixth Circuit. It is reasonable to assume that, in the Second Circuit, district courts would have to follow the mandates of the Circuit as to the elements of a federal offense. Judge Weinsteins's election to instruct the jury in a fashion contrary to the ruling of the Sixth Circuit on the same elements speaks to the credibility of the Sixth Circuit decision.

The Second Circuit, itself, does not attach the meaning to United States v. Williams, supra, that was attached by the Sixth Circuit on the same issue.

The language cited above is the best

example of a Circuit, other than the Sixth, interpretting the purpose of the statutes in a contemporary ethical situation. Regarding the elements to be proven to sustain a conviction, the Second Circuit obviously, sides with the other Circuits, argued by the government to require the government to prove "additional compensation" to the official salary to sustain a conviction, through gifts and gratuites.

Representative Biaggi got something for free, a gratuitous vacation for him and his girlfriend. He did not pay for it nor did he reimburse Esposito for paying for it. This is a classic example of the proper use of the federal gratuity statute.

Petitioner's contention before the Circuit was that he was not proven to have requested or received a gratuity,

or the "additional compensation" inherent in a gratuity. Accordingly, his Motion for Acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, should have been granted.

The Circuit, in affirming the district court's denial of the Rule 29 Motion, parted from every other Circuit which has ruled on the issue. The instant ruling has also provided precedent for the government to prosecute any public official under 18 U.S.C. 201(g) and any vendor of goods or services to public officials under 18 U.S.C. 201(f) for offering/giving or requesting/ receiving things of value in instances where the "things" were not proven to have been transferred as gratuities.

Even in cases where public officials make valid purchases from vendors for goods and services, those very goods and

services, even though not transferred gratuitously, would still, under the ruling of the Sixth Circuit, constitute the transfer of "things of value", under 18 U.S.C. 201(g).

The reason the Sixth Circuit is wrong, and the reason the Writ should be granted is that the purpose of the statute is to prohibit the payment of "unauthorized compensation" to public officials, that is, gifts. There is no precedent which says the purpose of the statute is to prohibit officials from requesting or receiving items or services which they purchase and which are never intended to provide them with "additional compensation". Yet that is what the Circuit has ruled.

The division from the other Circuits occured when the Sixth Circuit failed to recognize the need for the government to

prove "additional compensation" to prove that the official requested or received a "thing of value".

When the Panel ruled that, as a matter of law, there is no need for the government to prove a gratuitous transfer of the "thing of value" listed in the indictment, the Panel ruled that there is no need for the government to prove the intent to give an official "additional compensation" or the intent of an official to receive such "additional compensation."

What about the honest public officials who will travel on corporate aircraft, eat at restaurants and lodge with constitutents at resorts? The honest officials will pay for their flights, their meals and their lodging. In every Circuit except, the Sixth, such conduct will not be violative of 18 U.S.C. 201(f) or (g) because the payment for the goods

or services will reflect an intent not to receive the things of value as gratuities and will not provide "additional compensation" to the officials.

However, in the Sixth Circuit, payment for these goods and services will be to no avail because that Circuit has ruled in the instant case that payment is "meritless" as a defense under 18 U.S.C. 201(f) and (g) because no need to prove a "gratuity" was intended by Congress.

To affirm the Petitioner's conviction, where no gratuity was proven, the Sixth Circuit has removed the requirement of having to prove a gratuity from the federal gratuity statute. Not only does this unprecedented ruling divide the Sixth from all of the other Circuits which have considered the issue, it makes a potential criminal out of every public official who pays for a "thing of value"

in the belief that only gifts and gratuities constitute violations of 18 U.S.C. 201(g).

Of primary importance is the requirement, expressed by Judge Weinstein, that "intent" is an element of the crime. Petitioner raised the issue to the Sixth Circuit, however, the Circuit elected not to rule on the issue of intent.

Intervention by this Court is required to settle the division of the Circuits. Of greater importance, this Court must protect all of the public officials whose conduct may be deemed criminal under the instant decision.

CONCLUSION

For the additional reasons cited above, it is respectfully submitted that a Writ of Certiorari should issue to review the decision of the Circuit Court.

APPENDIX "A"

REQUEST NO. 4

COUNT FIVE -- GRATUITY - DEFENDANT BIAGGI

If you find the defendant Biaggi guilty of Count Three, the bribery count, then there is no need for you to consider count five.

However, if you find that the government has not sustained its burden of proof on the bribery charge against the defendant Biaggi, you must then consider whether the defendant Biaggi violated count five.

Count Five charges the defendant Biaggi with violating what is known as the gratuity statute. That statute, Section 201(g), provides in pertinent part:

> Whoever, being a public official ... otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything

> of value for himself for or because of any official act performed or to be performed by him,

shall be guilty of a crime.

Congress, in enacting the gratuity statute, sought to prohibit any government employee from receiving, in the course of any official duties, any additional compensation or a tip or gratuity for or because of any official act already done or to be done in the future. The awarding to, or receipt or acceptance by, a government employee of gifts or gratuities was deemed an evil in itelf since the employee may then tend, subtly or otherwise, to give preferential treatment to those who give gifts. In short, the purpose of this statute is to assure high standards of ethical behavior by government employees, and to enforce uniform treatment of all citizens who have matters before government agencies.

The gratuity statute, unlike the bribery statute, does not involve any corrupt intent to be influenced in the performance of an official act. The charge here is what is known as a lesser included offense of the bribery charge and it is based upon the same events relied upon in connection with the bribery count. However, the essential elements are different. In order to find the defendant guilty of violating the gratuity section of the statute, you must find beyond a reasonable doubt:

First, between March 1984 and June 2, 1986, the defendant Biaggi knowingly and willfully asked, sought, accepted, received, or agreed to receive a thing of value described in the indictment for himself.

Second, that he asked, solicited, sought, accepted, received, or agreed to

receive the thing of value for or because of an official act performed or to be performed by him.

Third, that he asked, solicited, sought, accepted received, or agreed to receive the thing of value otherwise than as provided by law for the proper discharge of official duties.

These gratuity elements can best be understood by comparing them with the elements under the bribery statute.

The first element is the same except for two things. With the gratuity charge, the defendant must have asked for, sought, received or agreed to receive the thing of value, or at least part of it for himself or for his own benefit. With bribery, the first element is met if he received or agreed to receive the thing of value for himself or for others.

Also with respect to the first

element, it is required that the defendant act knowingly and willfully, the same as in the bribery charge, but keep in mind that corruptly is required under bribery and not under this charge.

The second element is that the defendant Biaggi asked for, sought, accepted, received or agreed to receive something of value for or because of an official act that had been performed or was to be performed by him.

The purpose of the law that prohibits receiving gratuities is to prohibit the public official, in the course of his official duties, from receiving additional compensation, as a tip or gratuity, for or because of an official act.

This requires you to consider why defendant Biaggi asked for, sought, accepted, received, or agreed to receive the payment of the spa expenses. From his

point of view, did he ask for, seek, accept, receive, or agree to receive the payment of the expenses at the spa in either the 1984-85 holiday season or the 1985-86 holiday season because of some official act that he had performed or would be asked to performed?

Here the government need only prove that the purpose of asking for, seeking, receiving or agreeing to receive the thing of value was to receive an additional reward, a gratuity, or tip, for or because of an official act performed or to be performed by defendant Biaggi.

Again, it is not necessary under this section that the government prove that the payment of or the promise to pay for the spa expenses actually caused, or prompted, or affected any official act; nor need the government prove the extent or the manner, or exact means by which the official act

might be done. And it is no defense that the official act was or would have been perfomed even if no gratuity was received. But the government must establish beyond a reasonable doubt that the thing of value was requested, demanded solicited, sought, accepted, received or agreed to be received because of some official act performed or to be performed by him in his position as a Congressman.

Finally, going back to the third element, that the defendant received or agreed to receive the thing of value otherwise than as provided by law for the proper discharge of official duty. This element is included in order to make it clear that lawful payments properly made to public officials such as salary, expenses, and fees of that sort, are not payments forbidden by the statute.

This charge is adapted from the

gratuity charge given by Judge Pratt in the Harrison Williams and John Murphy cases. 2/ It includes language recommended by Judge Sand, Instructions 16-2, 16-8. The language is also supported by an unbroken line of authority. United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966; United States v. Strand, 574 F.2d 993, 995 & n.2 (9th Cir. 1978); United States v. Niederberger, 580 F.2d 63, 68-69 (3d Cir.), cert. denied sub nom. Gent v. United States, 439 U.S. 980 (1978); United States v. Evans, 572 F.2d 455, 479-81 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v.

2/ Williams was convicted on the bribery charges, so the jury never had to consider the gratuity charges. Murphy, however, was acquitted of bribery but convicted on the gratuity charge. Notably, the defense did not even make an issue of the Court's charge on appeal. See United States v. Myers, et al., 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983).

Alessio, 528 F.2d 1079, 1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Brewster, 506 F.2d 62, 72, n.26 (D.C. Cir. 1974).

REQUEST NO. 5

COUNT FOUR--GRATUITY--DEFENDANT ESPOSITO

The defendant Esposito is also charged with violating a provision of the gratuity statute in Count Four. As with the defendant Biaggi, if you find that the defendant Esposito is guilty on Count Two, the bribery charge, then there is no need to consider Count Four. If however, you acquit the defendant Esposito on the bribery charge, you must then consider whether he violated the gratuity statute.

The statute the defendant Esposito is charged with violating, Section 201 (f), states in the pertinent part:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly

> or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official, . .

shall be guilty of a crime.

Once again bear in mind that this provision, unlike the bribery provision, does not involve any corrupt intent to influence a government official or employee. The purpose of the law is to prohibit the offering or giving to a public official additional compensation such as a tip or a gratuity for or because of an official act.

The charge is based upon the same events relied upon in connection with the bribery count, but again it is what is known as a lesser included offense of the bribery charge and the essential elements are diffferent.

In order to find the defendant Esposito guilty of violating the gratuity

section of the statute, you must find beyond a reasonable doubt:

First, that the defendant Esposito between March 1984 and June 2, 1986, willfully and dnowingly offered, promised, or gave a thing of value for or because of an official act charged in the indictment that was performed or to be performed by Mario Biaggi.

Third, that the thing of value was offered, promised, or given otherwise than as provided by law for the proper discharge of official duties.

. . . .

This charge essentially repeats the language recommended by Judge Sand. Instruction 16-8. Some additional language has been taken from Judge Pratt's charges in Williams and Murphy.

APPENDIX "B"

JUDGE WEINSTEIN'S CHARGE TO THE JURY

Count four charges Mr. Meade Esposito with illegally giving a thing of value to Congressman Mario Biaggi in violation of 18 U.S.C. Section 201(f). The indictment reads as follows:

On or about and between March 1984 and June 2, 1986, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant, Meade Esposito, otherwise than as provided by law for the proper discharge of official duty, unlawfully, willfully and knowingly did directly and indirectly give, offer and promise to Mario Biaggi the payment of spa, recreation, food and other expenses incurred and to be incurred by Mario Biaggi and another person at the Bonaventure Hotel and Spa in the State of Florida, In December 1984 and January 1985 and in December 1985 and January 1986, for and because of official acts performed and to be performed by him as a Member of Congress, to wit: (1) his actions in matters concerning the decisions and actions of the Mayor, Deputy Mayors, and other officials and employedds of the City of New York in relation to matters concerning the Coastal Dry Dock and Repair Corporation's dispute with the City of New York and the Brooklyn Navy Yard Development Corporation regarding its utility and other charges and matters, (2)

his actions in matters involving claims submitted and to be submitted by the Coastal Dry Dock and Repair Corporation to the United States for work performed and to be performed on and in United States naval vessels and other vessels of the United States, and (3) his actions in matters involving the awarding of United States government contracts which would benefit the Coastal Dry Dock and Repair Corporation and which might at any time be pending and which might be brought before the departments, agencies and branches of the Government of the United States.

Section 201(f) provides:

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official ... for or because of any official act performed or to be performed by such public official ...

shall be guilty of a crime.

If you find Mr. Esposito guilty under Count of the promise, offer, or payment of a bribe to influence Congressman Biaggi in the discharge of his official Congressional duties, do not consider the charges in count four.

If you find that the government has

not sustained its burden of proving beyond a reasonable doubt that Mr. Espcsito promised, offered, or gave the money or thing of value with corrupt intent as required under the bribery charge, count two, you must then consider whether the defendant violated this statute.

This provision, unlike the bribery provision, does not require a corrupt intent to influence a government official or employee. It prohibits the offering or giving or promise of giving to a public official additional compensation or other thing of value for or because of an official act. The provision does require criminal intent.

Unlike the bribery charge in count two, the charge in count four can apply to past official acts as well as to future ones. Therefore, payments to officials for acts that would have been performed in

any event--whether before or or after those acts have occured--can be illegal, while a bribe must involve an exchange of something of value to induce an official act in the future.

The charge in count four is base upon the same events relied upon in connection with the briber count, but the essential elements are different.

In order to find the defendant Esposito guilty of violating Section 201(f) of the statute (count four), you must find beyond a reasonable doubt three elements:

First, that between March 1984 and June 2, 1986, the defendant wilfully and knowingly offered, promised, or gave a thing of value as charged in the indictment of Mario Biaggi. This is a criminal state of mind less than that required for bribery but which still

requires a purposeful disobeyance of the law.

Second, that Mr. Esposito offered, promised, or gave the thing of value for or because of a specific official act or acts charged in the indictment that was performed or to be performed by Mario Biaggi. There must be a connection between the thing of value and the official act. You must also decide whether the acts charged were "official."

Proof of only a general desire to influence the Congressman or curry favor with him is insufficient. In order to convict Mr. Esposito of the crime of giving illegal compensation, you must find that the government has proved beyond a reasonable doubt that the purpose that Mr. Esposito had in mind in giving a thing of value to Congressman Biaggi was to give him compensation in addition to his

regular Congressional compensation paid by the United States, for or because of his actions on behalf of Coastal Dry Dock and Repair Corporation. The act is criminal if the official act was or would have been performed even if no thing of value were received. If the thing of value was given out of friendship or for any other reason not charged in the indictment, it is not a crime.

Third, that the thing of value was offered, promised, or given otherwise than as provided by law for the proper discharge of official duties.

Count Five charges Congressman Biaggi with violating the statute, Title 18 U.S.C. Section 201(g). The Indictment reads as follows:

On or about and between March 1984 and June 2, 1986, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant, MARIO BIAGGI, a

Member of Congress, otherwise than as provided by law for the proper discharge of official duty, unlawfully, wilfully and knowingly did directly and indirectly ask, demand, exact, solicit, seek, accept, receive and agree to receive for himself, from Meade Esposito, the payment of spa, recreation, food and other expenses incurred and to be incurred by the defendant MARIO BIAGGI, and another person at the Bonaventure Hotel and Spa in the State of Florida, in December 1984 and January 1985 and in December 1985 and January 1986, for and because of official acts performed and to be performed by him as a Member of Congress, to wit: (1) his actions in matters concerning the decisions and actions of the Mayor, Deputy Mayors, and other officials and employees of the City of New York in relation to matters concerning the Coastal Dry Dock and Repair Corporation's dispute with the City of New York and the Brooklyn Navy Yard Development Corporation regarding its utility and other charges and matters, (2) his actions in matters involving claims submitted and to be submitted by the Coastal Dry Dock and Repair Corporation to the United States for work performed and to be performed on and in United States naval vessels adn other vessels of the United States, and (3) his actions in matters involving the awarding of Coastal Dry Dock and Repair Corporation and which might at any time be pending and which might be brought before the departments, agencies and branches of the Government of the United States.

Section 201(g) reads as follows:

> Whoever, being a public official, ...otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him...

shall be guilty of a crime.

If you find Congressman Biaggi guilty under count three, you should proceed no further and not consider the charge in count five. However, if you find that the government has not sustained its burden of proving the bribery charge against Congressman Biaggi, you must then consider whether Congressman Biaggi violated count five.

Unlike the bribery statute, section 201(g) does not involve corrupt intent to be influenced in the performances of an official act. It must be shown only that the act was committed knowingly and purposefully and not through accident,

misunderstanding, inadvertance of other reasons not charged in the indictment.

Section 201(g), unlike the bribery section, applies to payment for past official acts as well as for future ones.

To find Congressman Biaggi guilty of violating section 201(g), you must find the following four elements beyond a reasonable doubt:

First, that between March 1984 and June 2, 1986, Congressman Biaggi knowingly and wilfully asked, sought, accepted, received or agreed to receive a thing of value -- the expenses of the spa -- for himself. This is the same as the first element of the briber charge, except for two facts: (1) the defendant must have asked, sought, accepted, received, or agreed to receive expenses of the trips to the spa at least partly for his own benefit, and (2) it is necessary that the

government show only that Congressman Biaggi acted knowingly and wilfully. He need not have received all of the value sought or promised. If Congressman Biaggi believed the thing of value was being given solely out of friendship, or for any other reason not charged in the indictment, he would not be guilty.

Second, you must find that Congressman Biaggi asked, solicited, sought, accepted, received or agreed to receive the thing of value for or because of an official act performed or to be performed by him. The government must prove that Congressman Biaggi's purpose in asking for, seeking, receiving or agreeing to receive the spa expenses was to receive compensation, in addition to that paid by the United States to him as a Congressman, and that the expenses were requested, received, or agreed to be received because

of an official act performed or to be performed by Biaggi in his position as a Congressman. The act is criminal even if the official act was or would have been performed had no thing of value been received. If the thing of value was given or offered out of friendship or for any other reason not charged in the indictment, it is not a crime. There must be a connection between the thing of value and the official act. You must also decide whether the acts charged were "official."

Third, you find that Biaggi asked, solicited, sought, accepted, received, or agreed to receive the thing of value otherwise than as provided by law for the proper discharge of official duties.

As to Count Four--that is as to Mr. Esposito--, the government must prove that the substantial and determining intent in

giving, offering, or agreeing to give something of value was for or because of the Congressman's official acts on behalf of Coastal Dry Dock.

As to Count Five--that is as Congressman Biaggi--the government must prove that the substantial and determining intent in receiving, seeking or agreeing to receive something of value was for or because of the Congressman's official acts on behalf of Coastal Dry Dock.

Proof that the Congressman understood that there was only a general desire to influence him or curry favor with him is insufficient to prove guilt.

I said Counts Four and Five required a lesser criminal intent. It is a different criminal intent.